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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH J. SANTOPIETRO and PERRY A. PISCIOTTI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JUDD BURSTEIN, P.C.
Attorneys for Petitioners
950 Third Avenue
New York, New York 10022
(212) 826-1200

On The Petition:
JUDD BURSTEIN, ESQ.*
MARC FERNICH, ESQ.

* *Counsel of Record*

10 pp

Questions Presented

1. Whether the Trial Court erred in making an upward sentencing departure for both petitioners for interfering with a government function, notwithstanding that Sentencing Guideline § 5K2.7 expressly states that this factor is "inherent in the offense," and ordinarily does not justify a departure?

2. Whether petitioners' sentence enhancements for obstructing justice contravene governing law because Santopietro's alleged obstruction did not materially hinder his investigation, prosecution or sentencing, and Pisciotti's enhancement was premised upon hearsay where there was no good cause for concealing the declarant's identity?

3. Whether petitioner Pisciotti's Sixth Amendment rights were presumptively violated because his trial counsel, who was under government investigation for obstructing justice in connection with the very crimes alleged in the indictment, was laboring under an actual conflict of interest?

4. Whether the Trial Court allowed the government to exceed the bounds of permissible expert testimony when it allowed an FBI agent to testify in statutory language indicating guilt, thereby bolstering the credibility of the government's linchpin fact witnesses?

List of Parties

Petitioners were indicted with Paul R. Vitarelli, Robert A. Giacomi, Jack R. Giacomi, Jeffrey P. Santopietro, Thomas E. Porzio and Fred L. Giusti. Petitioners stood trial with all of their co-defendants except for Jeffrey P. Santopietro and Thomas E. Porzio, who were severed and ultimately entered into plea agreements with the government.

Table of Contents

Questions Presented i

List of Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of the Case 2

Statement of Facts 6

Jurisdiction in the Original Court 10

Reasons For Granting The Writ 10

1. Petitioners Received Improper Upward Departure Sentences Because the Lower Courts Misconceived the Interplay Between Guidelines § § 5K2.7 and 2C1.1, An Issue of First Impression for This Court 10

2. Petitioners' Sentence Enhancements for Justice Obstruction Were Erroneous Because, *Inter Alia*, the Lower Courts' Reading of the Guidelines Permits an Enhancement Without Any Showing of "Material Hindrance" of the Offender's Investigation, Prosecution, or Sentencing 16

3. Pisciotti's Sixth Amendment Rights Were Presumptively Violated, and His Conviction Must be Reversed, Because His Attorney was Laboring Under an Actual Conflict of Interest 20

4. There Must be a New Trial Because a Government Expert was Allowed Improperly to Bolster the Credibility of its Linchpin Fact Witnesses by Testifying in Statutory Language Indicating Guilt 26

5. Pursuant to Rule 12.2 of This Court, Petitioners Join in the Arguments Contained in the Petitions Submitted by Their Codefendants Insofar as They Are Applicable to Petitioners . . 30

Conclusion 30

Appendix A -- Opinion of the United States Court of Appeals 1a

Appendix B -- Order of the United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc 11a

Appendix C -- Constitutional and Statutory Provisison 13a

Table of Authorities

Cases:

Bellamy v. Cogdell, 974 F.2d 302 (2d Cir. 1992) (*in banc*), *cert. denied*, __ U.S. __, 113 S.Ct. 1383 (1993) 5

Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) 28

In Re Mann, 728 F.Supp. 60 (D.Me. 1990) 19

Solina v. United States, 709 F.2d 160 (2d Cir. 1983) 5, 22, 23

United States v. Aiello, 900 F.2d 528 (2d Cir. 1990) 6, 24, 25

United States v. Barnett, 939 F.2d 405 (7th Cir. 1991) 4, 18, 19

United States v. Barone, 913 F.2d 46 (2d Cir. 1990) 13, 14

United States v. Bilzerian, 926 F.2d 1285 (2d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 63 (1991) 27

United States v. Burns, 893 F.2d 1343 (D.C. Cir. 1990), *rev'd. on other grounds*, __ U.S. __, 111 S.Ct. 2182 (1991) 14

United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613 (1974) 19

United States v. Cancilla, 725 F.2d 867
(2d Cir. 1984) 5, 21-25

United States v. Cruz, 981 F.2d 659
(2d Cir. 1992) 28, 29

United States v. Dunnigan, U.S. ,
113 S.Ct. 1111 (1993) 4, 16, 19, 20

United States v. Eisen, 974 F.2d 246
(2d Cir. 1992), *cert. denied*, __ U.S. __,
113 S.Ct. 1840 (1993) 6, 24, 25

United States v. Fatico, 579 F.2d 707
(2d Cir. 1978) 19, 20

United States v. Fulton, __ U.S. __,
Nos. 91-1048 and 92-2105 (2d Cir.
September 22, 1993) 5, 23, 24

United States v. Hudson, 972 F.2d 504
(2d Cir. 1992) 15

United States v. Jones, 900 F.2d 512
(2d Cir.), *cert. denied*, __ U.S. __,
111 S.Ct. 131 (1990) 6, 24, 25

United States v. Kim, 896 F.2d 678
(2d Cir. 1990) 16

United States v. Locascio and Gotti,
__ U.S. __, Nos. 92-1382, 1384, 1671,
93-1181 (2d Cir. October 8, 1993) 5

United States v. Riviere, 924 F.2d 1289
(3rd Cir. 1991) 14

United States v. Rodriguez, 942 F.2d 899
(5th Cir. 1991), *cert denied*, __ U.S. __,
112 S.Ct. 990 (1992) 4, 18

United States v. Rodriguez, 968 F.2d 130
(2d Cir.), *cert. denied*, __ U.S. __,
113 S.Ct. 140 (1992) 6, 16

United States v. Schwartz, 924 F.2d 410
(2d Cir. 1991) 29

United States v. Scop, 846 F.2d 135
(2d Cir.), *modified on other grounds*,
856 F.2d 5 (1988) 27, 28

United States v. Scop, 856 F.2d 5
(2d Cir. 1988) 29

United States v. Stephens, __ F.2d __,
No. 92-1553 (2d Cir. October 7, 1993) 15, 16

United States v. Stroud, 893 F.2d 504
(2d Cir. 1990) 17, 18

United States v. Urbanek, 930 F.2d 1512
(10th Cir. 1991) 4, 18

United States v. Williams, 952 F.2d 1504
(6th Cir. 1991) 4, 18

United States v. Young, 981 F.2d 180
(5th Cir. 1992), *reh'g denied sub nom.*,
985 F.2d 555, *cert. denied sub nom*,
__ U.S. __, 113 S.Ct. 2454 (1993) 20

United States v. Zackson, __ F.2d __,
No. 92-1525 (2d Cir. October 4, 1993) 6

Waterhouse v. Rodriguez, 848 F.2d 375
(2d Cir. 1988) 6

Statutes and Rules:

18 U.S.C. § 371 . . . . . 2, 3

18 U.S.C. § 665 . . . . . 2, 3

18 U.S.C. § 666 . . . . . 1-3, 7, 8, 10, 11, 26, 27, 29

18 U.S.C. § 872 . . . . . 2, 12

18 U.S.C. § 1344 1-3

18 U.S.C. § 1951 . . . . . 2, 12

18 U.S.C. § 3231 . . . . . 2, 10

26 U.S.C. § 7201 . . . . . 2, 3

28 U.S.C. § 1254 2

Sup.Ct.R. 12.2 . . . . . 2, 30

Sup.Ct.R. 14.1(f) 2

U.S. Const. amend. V 2

U.S. Const. amend. VI . . . . . i, 2, 3, 5, 20, 21, 23

U.S.S.G. § 2C1.1 . . . . . 2, 3, 10-12, 15

U.S.S.G. § 2C1.1, Application Note 5 . . . 2, 3, 11, 12, 15

U.S.S.G. § 3C1.1 . . . . . 2, 4, 17

U.S.S.G. § 3C1.1, Application Note 3(d) 2, 4, 17, 18

U.S.S.G. § 5K2.0 . . . . . 2, 12

U.S.S.G. § 5K2.7 . . . . . i, 2-4, 10-16

U.S.S.G. § 6A1.3, Commentary 2, 19

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IN THE

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JOSEPH J. SANTOPIETRO, PERRY A. PISCIOTTI,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Joseph J. Santopietro and Perry A. Pisciotti respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 9, 1993, affirming their convictions for bribery (18 U.S.C. § 666), bank fraud (18 U.S.C. § 1344), and related offenses.

Opinions Below

The unreported opinion of the Court of Appeals is reprinted in the Appendix at pages 1a to 10a. The order of the Court of Appeals denying petitioners' petition for rehearing appears in the Appendix at pages 11a to 12a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 9, 1993. On July 29, 1993, the Court of Appeals denied petitioners' timely petition for rehearing. This petition for a writ of certiorari timely followed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Pursuant to Rule 14.1(f) of this Court, the provisions involved in this petition are set out verbatim in the Appendix at 13a to 27a. The citations to those provisions are:

U.S. CONST. amends. V, VI.

18 U.S.C. § § 371; 665; 666; 872; 1344; 1951; 3231.

26 U.S.C. § 7201.

28 U.S.C. § 1254(1).

U.S.S.G. § § 2C1.1; 2C1.1, Application Note 5; 3C1.1; 3C1.1, Application Note 3(d); 5K2.0; 5K2.7; 6A1.3, Commentary.

SUP. CT. R. 12.2; 14.1(f).

Statement of the Case

This case arises from an influence peddling scheme in Waterbury, Connecticut allegedly involving Santopietro, the former City Mayor, Pisciotti, the former City GOP chairman, and others. By this petition, Santopietro seeks review of the Second Circuit's affirmance of his conviction and 108 month

sentence for bribery conspiracies (18 U.S.C. § 371); receiving corrupt payments (18 U.S.C. § 666(a)(1)(B)); bank fraud (18 U.S.C. § 1344); embezzling federal grant monies (18 U.S.C. § 665(a)); and tax evasion (26 U.S.C. § 7201). Pisciotti seeks review of the Second Circuit's affirmance of his conviction and 114 month sentence for conspiracy (18 U.S.C. § 371); bribery (18 U.S.C. § 666(a)(2)); and bank fraud (18 U.S.C. § 1344).

As we demonstrate below, this petition raises issues of widespread importance in two of the most fundamental and most intensely litigated areas of criminal law: Guideline sentencing, and the Sixth Amendment right to effective counsel.

With respect to the sentencing issues, this case presents the Court with questions of first impression which, given the ubiquitous nature of the Guidelines, have nationwide significance. Specifically, this Court has never before interpreted the scope of Guideline § 5K2.7, which allows upward departures in cases involving "a significant disruption of governmental function," but discourages such departures where governmental interference "is inherent in the offense."

Here, governmental interference was inherent in the bribery guideline under which petitioners were sentenced. Hence, that Guideline provides for an eight point offense level increase for bribes paid to influence government officials. *See* Guideline § 2C1.14(b)(2)(B). Yet, despite the dictate of Guideline § 5K2.7, the Trial Court also imposed an upward departure for interfering with a governmental function: the very factor that motivated the offense level increase.

In so doing, the Court relied upon Application Note 5 to Guideline § 2C1.1, which authorizes upward departures for "systematic or pervasive corruption of a governmental function." Surely the imposition of both an upward adjustment and an upward departure for a single factor constituted impermissible double counting. But on a broader level, the Court's action reveals a fundamental tension between Application Note 5 and Guideline § 5K2.7. On the

one hand, the Application Note allows upward departures for corrupting a government function, even though this factor is inherent in the bribery guideline. But on the other hand, Guideline § 5K2.7 discourages those same departures when corrupting a government function is "inherent in the offense."

Given the proliferation of white collar prosecutions, this is a nettlesome, nuts-and-bolts issue of Guidelines interpretation which can only reoccur. Moreover, as this Court well knows, the lower courts must wrestle with these Guidelines on a daily basis. Thus, resolving here the apparent conflict between these provisions can only further the Guidelines' mission of promoting sentencing uniformity and predictability.

Another transcendent issue here concerns the justice obstruction enhancements imposed upon both petitioners under Guideline § 3C1.1. As evidenced by this Court's decision in *United States v. Dunnigan*, __ U.S. __, 113 S.Ct. 1111 (1993), this is an issue which confronts virtually every convicted defendant in every federal prosecution today. Here, as we explain below, Santopietro, in contrast to *Dunnigan*, received the two point adjustment even though his alleged obstructionism in no way hindered his investigation, prosecution or sentencing. As detailed *infra*, we contend -- and many courts have held -- that, absent some "material hindrance," the enhancement is barred by Application Note 3(d) to the obstruction Guideline. *See, e.g., United States v. Barnett*, 939 F.2d 405 (7th Cir. 1991); *United States v. Urbanek*, 930 F.2d 1512 (10th Cir. 1991); *United States v. Rodriguez*, 942 F.2d 899 (5th Cir. 1991), *cert denied*, __ U.S. __, 112 S.Ct. 990 (1992); *United States v. Williams*, 952 F.2d 1504 (6th Cir. 1991). To clarify the potentially horizonless scope of Guideline § 3C1.1 in light of *Dunnigan*, we respectfully ask the Court to decide here whether some showing of "material hindrance" is required for a justice obstruction adjustment.

With respect to the Sixth Amendment issue, we demonstrate that Pisciotti was represented by a trial attorney who was involved in obstructing justice with respect to the very offenses of which Pisciotti stood accused. Prior its decision in this case -- and subsequently, as well -- the Second Circuit held that such actual attorney conflicts constitute a *per se* Sixth Amendment violation, requiring automatic reversal and a new trial. *See, e.g., United States v. Cancilla,* 725 F.2d 867 (2d Cir. 1984); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983); *United States v. Fulton,* __ U.S. __, Nos. 91-1048 and 92-2105 (2d Cir. September 22, 1993) (reversing and remanding for new trial where government witness previously had imported heroin for defendant's trial counsel). *Cf. United States v. Locascio and Gotti*, __ U.S. __, Nos. 92-1382, 1384, 1671, 93-1181 (2d Cir. October 8, 1993) (affirming disqualification of trial counsel on ground of apparent conflict of interest).

As we demonstrate below, there can be no principled distinction between the instant case and these governing authorities. Yet here, the Court afffirmed Pisciotti's conviction summarily, without passing on the merits of his Sixth Amendment claim, and without a hint of legal analysis as to what makes this case different from the *per se* reversal cases just cited.

With the utmost respect to the Second Circuit, we submit that actually conflicted counsel is tantamount to no counsel at all. The right to uncompromised legal representation is perhaps the most vital right in our justice system. Yet, the scenario of a conflicted advocate arises with surprising -- and disheartening -- frequency.[1] Thus, by

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[1] In the Second Circuit alone, our research reveals numerous direct appeals involving ineffective assistance claims in recent years. *See supra and authorities cited. See also Bellamy v. Cogdell,* 974 F.2d 302 (2d Cir. 1992)(*in*

(continued...)

hearing, and reversing, Pisciotti's case, the Court can give the lower courts a ready means for disposing of such cases: a bright line rule that anything less than conflict-free representation is constitutionally unacceptable, and cannot be tolerated.

Statement of Facts

This is a case about alleged political corruption. In essence, there were two separate theories of prosecution. *First*, the government contended that Waterbury Mayor Joseph Santopietro and the other City official codefendants had been coopted by various real estate developers for assistance with zoning and other legislative or administrative decisions. This part of the case also included allegations of bank fraud. *Second*, the government contends that Santopietro embezzled funds from a federally funded job training program. Only Santopietro was charged with this part of the government's case.

The Corrupt Payments Portion of the Case

As we argued below, there were fundamental weaknesses in this part of the government's case. Paramount

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[1](...continued)
banc), *cert. denied*, __ U.S. __, 113 S.Ct. 1383 (1993) (habeas case); *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1840 (1993); *United States v. Jones*, 900 F.2d 512 (2d Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 131 (1990); *United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990) (habeas case); *Waterhouse v. Rodriguez*, 848 F.2d 375 (2d Cir. 1988) (habeas case); *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 140 (1992); *United States v. Zackson*, __ F.2d __, No. 92-1525 (2d Cir. October 4, 1993).

among these was the fact that the illegality of the various transactions was contingent upon the jury believing the testimony of accomplice witnesses with severe credibility problems. We do not dispute that the monies received by Santopietro and other codefendant City officials often came to them through a rather tortuous path. But, regardless of any suspicious circumstances associated with any particular payments, the testimony of the accomplice witnesses was necessary to render them illegal. Given this fundamental fact, it cannot be said that the evidence of guilt was overwhelming.

This was not a case where the government claimed that there was a *quid pro quo* between any particular payment and any particular government action. Rather, as accomplice witness Richard Barbieri, the former President and Chief Executive Officer of Security Savings and Loan ("Security") (A: 724-25)[2], testified, he met with petitioners at a crowded restaurant[3] after Santopietro's election, at which time the alleged conspiracy was hatched. (A: 738-39)

This was the alleged corrupt agreement, and it did not involve direct payment of monies for any particular action. (A: 905) Thus, with respect to the charges of corrupt payments in violation of 18 U.S.C. § 666, there was never a claim that particular monies were paid to Santopietro or the other defendants in return for specific actions. Hence, the fact that Santopietro or the other city official defendants received monies through Pisciotti could only be rendered criminal by the alleged original agreement of corrupt cooperation.

In other words, there is no dispute that Pisciotti paid money, and that Santopietro and the other City official

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[2] Numbers preceded by the letter "A" refer to pages of the Joint Appendix submitted to the Court of Appeals; those preceded by dates refer to pages of the trial transcript not included in that Appendix.

[3] Significantly, this testimony was never corroborated.

defendants received it. But the mere payment of money to, or receipt of it by, an elected official does not violate 18 U.S.C. § 666. Rather, by the express terms of the statute, the payment must be "corrupt."

Here, the only proof of corruption came from the government's accomplice witnesses, bank officials Richard Barbieri and John Corpaci. Both of these officials had committed numerous frauds beyond those alleged in the indictment, and therefore came before the jury with all of the credibility problems associated with accomplice witnesses. Accordingly, this part of the government's case cannot be viewed as overwhelming.

The Bank Fraud Portion of the Case

Count Five of the indictment charged Mayor Santopietro with fraudulently securing a loan by concealing the fact that the proposed guarantor had been promised a hold-harmless agreement. (A: 51-52) Like the § 666 charges, this charge rested solely upon Barbieri's testimony that had he known about the hold-harmless agreement, he would not have accepted the guarantor.

Count Six alleged that petitioners defrauded Security by obtaining an $85,000 loan for "property improvements" when in fact $63,000 of the money went to Santopietro, who then repaid other outstanding loans. This charge also depended upon Barbieri's credibility. This is so because the loan application was signed not by petitioners, but by accomplice witness Scott Miele. And Miele testified that he merely signed the application at Pisciotti's request, and did not discuss it with him. (3/10: 177)

Hence, the only testimony which tied Pisciotti and Santopietro to the false statement on the bank loan was Barbieri's testimony that, "[w]e discussed the purpose. We really didn't come to a conclusion as to the purpose of a loan. I put down on the application that it was for property improvements." (3/6: 80)

BEST AVAIL

The DEEGA Counts

The next part of the case (Counts 14-22) alleged that Santopietro, and not the other defendants, had embezzled funds from the Department of Employment, Education and Grants ("DEEGA"), Waterbury's agency for administering federal money from programs such as the Job Training Partnership Act and the Stewart McKinney Homeless Assistance Grants. (A: 61-70) In essence, the government contended that Santopietro misspent some of these funds in the course of undertaking duties legitimately financed by DEEGA.

The defense to this charge was that Santopietro, who initiated the very special review which uncovered corruption in the DEEGA program, had not willfully misapplied funds. Rather, Santopietro, a man with no legal and accounting experience, had appropriately relied upon the myriad federal, state and local auditors and experts overseeing this money. None of these people voiced any concern about Santopietro's conduct during his six year tenure as Mayor. (3/30: 139-41) Moreover, the Mayor had a $15,000 discretionary fund for travel and official expenses which could have been used to reimburse DEEGA for any questionable expenses. (A: 1834-36) The availability of this fund offered strong proof that any improprieties with respect to Mayor Santopietro and DEEGA were not willful.

In opposition to the Mayor's claims, the government offered the testimony of accomplice witnesses who insisted that the Mayor was aware of his wrongdoing with respect to the DEEGA funds. Once again, then, these counts came down to a question of credibility.

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The Tax Counts

Finally, Counts 28 and 29 charged Mayor Santopietro with tax evasion arising from the alleged corrupt payments he received in violation of 18 U.S.C. § 666. Thus, if the monies were in fact corrupt payments, there was tax evasion. But if, as Santopietro claims, the money consisted of loans and gifts, no crime was committed.

Conclusion

Petitioners' decision not to challenge the sufficiency of the evidence below was not a concession of guilt. Rather, it was a recognition that the government is blessed with every favorable factual inference on appeal. From the jury's perspective, though, this case, wholly contingent as it was on credibility determinations, was a very close one.

Jurisdiction in the Original Court

The District Court had jurisdiction under 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I

Petitioners Received Improper Upward Departure Sentences Because the Lower Courts Misconceived the Interplay Between Guidelines § § 5K2.7 and 2C1.1, An Issue of First Impression for This Court

A. The Basis for Petitioners' Sentences

For Santopietro, the District Court ultimately arrived at an offense level of 31, and imposed a 108 month sentence. The Court calculated the sentence pursuant to Guideline §

2C1.1, which sets a base offense level of 10 for the § 666 offenses, and provides for an eight point increase if "the offense involved a payment for the purpose of influencing an elected official." In reaching the ultimate offense level of 31, the Court, *inter alia*, upwardly departed four levels on the ground that Santopietro's crime had involved a disruption of governmental function.

As for Pisciotti, the Court also arrived at an ultimate offense level of 31, but sentenced him to 114 months imprisonment. Like Santopietro, Pisciotti was sentenced under § 2C1.1. But instead of the eight point increase because "the offense involved a payment for the purpose of influencing an elected official," Pisciotti's offense level was adjusted by 10 points upon a finding that the financial benefit he had secured warranted an extra increase under § 2F1.1's table for "Fraud and Deceit." In reaching Pisciotti's ultimate offense level of 31, the Court, *inter alia*, upwardly departed three levels on the ground that his crime also had involved disruption of a government function.

On this POINT, we argue that the upward departures violated Guideline § 5K2.7. Moreover, we show that the Court's construction of Application Note 5 to Guideline § 2C1.1 -- upon which it relied in departing upward -- conflicts with § 5K2.7 on its face. This apparent contradiction has never before been addressed by this Court, and should be resolved here.

B. The Upward Departures Fail to Conform to the Guidelines, and Create an Inconsistency Within Them

As noted, §2C1.1(b)(2)(B) authorizes an eight level adjustment where "the offense involved a payment for the purpose of influencing an elected official." Nevertheless, the District Court made an additional departure on the ground that petitioners' offenses involved a disruption of government function. In departing upward, the District Court relied upon

Application Note 5 to § 2C1.1, which states: "Where the Court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process or office that may cause loss of public confidence in government, an upward departure may be warranted." We proceed to show that the District Court's interpretation of Application Note 5 was erroneous, and cannot be squared with § 5K2.7.

It is important to recognize that not all crimes covered by § 2C1.1 inherently disrupt government functions. For example, § 2C1.1 also applies to extortion by government officials, which does not *necessarily* have any effect upon the governing process. *See* 18 U.S.C. §§ 872 and 1951. Plainly, then, Application Note 5 speaks to the situation where crimes such as extortion effect, as a factual matter but not inherently, governmental functions. Thus, under § 2C1.1, a conviction under 18 U.S.C. § 1951 for extortion under color of official right would yield a base offense level of just 13 if less than $10,000 had been extorted. If, however, that extortion had a significant effect upon governmental processes, a more severe sentence might be in order.

The situation is far different, however, where the crime at issue is bribery of an elected official. In that circumstance, the Guidelines themselves provide for a sentence enhancement. Specifically, as noted, § 2C1.1(b)(2) imposes an eight point enhancement where, as here, the defendant was convicted for receiving corrupt payments while serving as an elected official.

For this reason, Application Note 5 to § 2C1.1 directs the reader to § 5K2 of the Guidelines, which unequivocally does *not* support the action taken by the District Court. Section 5K2.0 states:

> Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart,

> departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, *disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable guideline is bribery or obstruction of justice.*

(Emphasis supplied)

Continuing in this vein, § 5K2.7 states:

> If the defendant's conduct resulted in a significant disruption of governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. *Departure from the guidelines ordinarily would not be justified when the offense is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.*

(Emphasis supplied)

This case notwithstanding, the lower courts have remained faithful to the mandate of § 5K2.7. In *United States v. Barone*, 913 F.2d 46 (2d Cir. 1990), the Court reversed the District Court's upward departure based upon the fact that the defendant, a local judge, had disrupted governmental functions by giving false grand jury testimony:

> Section 5K2.7 states that the court may increase a sentence above the guideline range "[i]f the defendant's conduct resulted in a significant disruption of a governmental function" (emphasis added). Yet, the section states further that "[d]eparture from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense...." As a consequence, the government cannot argue that § 5K2.7 justifies a departure based upon Barone's perjury in front of the grand jury, for interference with a government function is inherent in that offense.

913 F.2d at 51; *see United States v. Burns*, 893 F.2d 1343, 1347 (D.C. Cir. 1990), *rev'd. on other grounds*, __ U.S. __, 111 S.Ct. 2182 (1991) ("disruption of government function is an inherent aspect of crimes such as bribery"); *United States v. Riviere*, 924 F.2d 1289, 1308 (3rd Cir. 1991) (no departure under §5K2.7 because disruption of government function is inherent in crime of assaulting a marshal).

Barone and the other cases cited above surely preclude the action taken here by the District Court -- especially in a case where there was no proof that any pressure was ever exerted upon any City official.[4] Plainly, absent such proof,

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[4] Waterbury City Planner Anthony Mirto testified that, in contrast to past mayors during his 35 year tenure with the City, Santopietro had *never* sought to influence him. (3/25: 104) Moreover, the only other City official called by the government was former Alderman and present Congressman Gary Frank. *Frank testified that petitioners had never sought*

(continued...)

there is nothing so unusual about this case as to make the applicable Guideline inappropriate. Yet, the Court of Appeals, without explanation, ignored this authority.

What makes this silence so troubling is that affirming here reads an irreconcilable contradiction into the Guidelines. For accepting the District Court's reasoning permits an upward departure from the Bribery Guideline in spite of § 5K2.7's clear mandate that departures are inappropriate for crimes such as bribery, where government interference inheres in the offense. Indeed, rejecting our view of Application Note 5 -- that it applies only to crimes involving government interference as a factual, but not an inherent, matter -- creates an intolerable conflict between the two provisions. Worse, the District Court's ruling opens the door to impermissible double counting -- a "two-fold upward adjustment," *United States v. Hudson*, 972 F.2d 504, 507 (2d Cir. 1992) -- in every case of official bribery.

This is a significant and disturbing result. But the Second Circuit inexplicably failed to address it. This being so, we respectfully submit that the District Court's ruling is ripe for consideration by this Court, and should not be left to stand.

Finally, even if some departure here were permissible, the Trial Court failed to follow the appropriate procedure in departing upward. In *United States v. Stephens*, __ F.2d __, No. 92-1553 (2d Cir. October 7, 1993), the Court vacated a sentence imposed by the very judge who tried this case because "the district court did not articulate its reasons for upwardly departing by five levels instead of by some lesser number." Slip. op. at 6469. Similarly, here, the Trial Court simply stated that it was upwardly departing "by four levels in reliance upon both section 2C1.1, application note five, and

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[4](...continued)
to influence him in his capacity as a zoning commissioner. (3/16: 255; 282)

on Section 5K2.7." (*See* A: 2360-62) As in *Stephens*, then, the same judge made the same error of failing to explain why he had selected a four level departure instead of some other amount. Yet, Stephens' sentence stands vacated, while Santopietro's and Pisciotti's stand affirmed. For this reason alone, the upward departures must fall.[5]

II

Petitioners' Sentence Enhancements for Justice Obstruction Were Erroneous Because, *Inter Alia*, the Lower Courts' Reading of the Guidelines Permits an Enhancement Without Any Showing of "Material Hindrance" of the Offender's Investigation, Prosecution, or Sentencing

The Trial Court also increased both petitioners' offense levels by two points upon a finding that they each had obstructed justice. The Court of Appeals' unexplained affirmance of these adjustments also contravened governing law. Moreover, this Court's recent opinion in *United States v. Dunnigan, supra,* makes clear that virtually any convicted defendant who testifies in his own behalf stands a very real chance of receiving the enhancement. Given this fact, and the fact that we present here a novel question of interpreting the obstruction Guideline, this is a case which begs for review by this Court.

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[5] We raised this argument below citing extant authority. *See United States v. Kim*, 896 F.2d 678 (2d Cir. 1990); *United States v. Rodriguez, supra.*

A. Santopietro

Santopietro received the enhancement upon a finding that, during the execution of a search warrant at his office, he temporarily secreted a briefcase which was turned over to the government "within minutes," with its contents intact. (A: 89-91)

Guideline § 3C1.1 permits a two level enhancement if the defendant "*willfully* obstructed or impeded, or attempted to obstruct or impede, the administration of justice...." (Emphasis supplied) However, Application Note 3(d) recognizes that, in certain situations, concealing evidence may not rise to the level of "willfully" obstructing justice. Specifically, Note 3(d) provides that

> if such conduct [destroying or concealing evidence] occurs contemporaneously with arrest ... it shall not, standing alone, be sufficient to warrant an adjustment for obstruction *unless it resulted in a material hindrance* to the official investigation or prosecution of the instant offense or the sentencing of the offender.

(Emphasis supplied)

We realize that this exception is expressly confined to evidence concealed "contemporaneously with arrest." Nonetheless, the rationale behind the exception, as well as the lower court decisions, dictates that it also be applied to evidence concealed during a search.

In *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990), the Court held that the term "willfully" as used in § 3C1.1 "requires that the defendant consciously act with the *purpose* of obstructing justice." 893 F.2d at 507 (Emphasis in original). In so doing, it drew a clear distinction between

an intentional effort to undermine an investigation, and a reflexive desire to avoid apprehension. 893 F.2d at 508. On this reasoning, the Court vacated the enhancement imposed upon the defendant, who had led the police on a lengthy chase when they tried to arrest him. 893 F.2d at 505.

The exception in Note 3(d), enacted subsequent to *Stroud*, plainly codifies the Second Circuit's holding. Thus, like *Stroud*, the exception acknowledges that a defendant who conceals evidence during arrest is motivated more by self-preservation than any conscious "*purpose* of obstructing justice." 893 F.2d at 507 (Emphasis in original). The same instinct is aroused when the Government appears at a defendant's door with a search warrant. In both scenarios, discovery of illegal evidence would have identical consequences: certain prosecution and likely incarceration. For all practical purposes, then, the situation confronting Mayor Santopietro on the day of the search was indistinguishable from that faced by a suspect during arrest. Under the rationale of *Stroud*, there can be no basis for applying the exception to one situation and not the other. Surprisingly, the Court of Appeals did not even comment on this meritorious claim.

The question thus becomes whether the minutes-long concealment of the briefcase "materially hindered" the investigation. *See* Note 3(d). In parallel situations, the Circuit Courts have found no "material hindrance." *See, e.g., United States v. Barnett, supra*, 939 F.2d at 407 (rejecting enhancement where defendant who promptly recanted false denial of guilt did not "cause investigators to expend any additional resources on their investigation"); *United States v. Urbanek, supra*, 930 F.2d at 1515 (vacating enhancement where defendant recanted alias on the spot and therefore "did not significantly impede or obstruct the investigation."). *Accord, United States v. Rodriguez, supra* (same); *United States v. Williams, supra*, 952 F.2d at 1516 "a defendant's

false statements must in some active way hurt or retard an investigation.").

To support a finding of "material hindrance," then, the defendant's obstructionism must have caused the Government to spend "additional resources" on the investigation. *United States v. Barnett, supra,* 939 F.2d at 407. Here, no "additional resources" could have been spent because the government left Mayor Santopietro's office with the briefcase. To clarify that the potentially limitless scope of *United States v. Dunnigan, supra,* does not reach this circumstance, we respectfully request that the Court hear this case.

B. Pisciotti

Pisciotti's sentence was enhanced upon a finding that he influenced the testimony of his sister, Edith Perugini. (A: 2265-66) However, the sole evidence supporting this allegation was rank hearsay -- an out-of-court statement by an employee of the United States Attorney. (A: 2264-66) Moreover, the lone reason proffered by the government for withholding the witness' identity was that "she was concerned about -- she asked that her name be, you know, left out of the proceedings." (A: 2266-67)

Absent some "good cause for [this] nondisclosure," there can be no doubt that the Sentencing Court's reliance on the hearsay was impermissible. *See* Commentary to Guideline § 6A1.3 *(quoting United States v. Fatico,* 579 F.2d 707 (2d Cir. 1978)). Simply put, a unilateral choice by a prosecutorial employee not to testify cannot be "good cause." *Cf. United States v. Calandra,* 414 U.S. 338, 345, 94 S.Ct. 613, 618 (1974) (burden, embarassment, social and economic injury not good cause for non-compliance with Grand Jury subpoena); *In Re Mann,* 728 F.Supp. 60, 61 (D.Me. 1990) (witness who ignored trial subpoena for "his own personal reasons" held in contempt for want of "adequate excuse" pursuant to Fed. R. Crim. P. 17 (g)). *Contrast Fatico, supra,* 579 F.2d at 710

(finding "good cause" for concealing informant's identity because of "past murders of informants who implicated organized crime members").

More fundamentally, though, the District Court's uncritical acceptance of the hearsay -- and the Second Circuit's failure to redress it -- offended Pisciotti's Due Process and Confrontation rights. *See, e.g., Fatico, supra,* 579 F.2d at 713 (Due Process clause obtains at sentencing) (collecting Supreme Court cases); *United States v. Young,* 981 F.2d 180, 188 (5th Cir. 1992), *reh'g denied sub nom.,* 985 F.2d 555, *cert. denied sub nom,* __ U.S. __, 113 S.Ct. 2454, 2983 (1993) (restricted Confrontation right applies at sentencing). Simply as a matter of fairness, this Court should remedy these violations by hearing this case and reversing.[6]

III

Pisciotti's Sixth Amendment Rights Were Presumptively Violated, and His Conviction Must be Reversed, Because His Attorney was Laboring Under an Actual Conflict of Interest

Approximately one week into the trial, Pisciotti replaced his lawyer, Paul Yamin, with another lawyer, Timothy Moynahan. At Pisciotti's sentencing, the government revealed its view that Yamin had been operating under an actual conflict of interest. Specifically, the government contended that Yamin was involved in an obstruction of justice stemming from the very crimes for

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[6] Parenthetically, we note that there is a world of difference between a finding by the Trial Judge that the defendant testified untruthfully -- the *Dunnigan* scenario -- and a second-hand allegation by a government employee who wants to remain anonymous. The Court should spell out that difference here.

which Pisciotti stood trial. Given this *per se* Sixth Amendment violation, automatic reversal was required by *United States v. Cancilla*, *supra*, and its progeny. But without even attempting to distinguish its own precedents, the Court of Appeals dismissed Pisciotti's ineffective assistance claim without comment. Because the right to conflict-free counsel is of such elemental importance, this summary dismissal deserves close scrutiny from this Court.

A. The Relevant Facts

As stated, Pisciotti's sentence was enhanced on the ground that he allegedly counseled the testimony of his sister, Edith Perugini. In arguing for that enhancement, the prosecutor made clear that she viewed Yamin as an active participant in the alleged justice obstruction:

> First of all, we don't claim that [at] the eleventh hour Mr. Pisciotti began to try to alter Mrs. Perugini's testimony. I think it's clear from the Grand Jury transcripts that the attempt to alter, soften, and blur Mrs. Perugini's testimony began between the time that she spoke to the agents at her home and the time *when she appeared at the Grand Jury – with Mr. Pisciotti's lawyer and a statement that Mr. Pisciotti's lawyer had written for her to tell her what the version of the events was.*
>
> * * *
>
> Just one final thing, Your Honor. That is, we might well not be here if the meeting [during trial] hadn't taken place, because at that point we acquired evidence of Mr. Pisciotti's personal involvement in what we believed had been an ongoing involvement in what we

> believed had been an ongoing effort to shape Mrs. Perugini's testimony. *I think it would not have been fair to tax Mr. Pisciotti himself with what we believed at the time of the Grand Jury was primarily the actions of his lawyer.*

(A: 2281; 2287) (Emphasis supplied)

Thus, there can be no doubt that, at the time of trial, the government believed that Yamin had been involved in obstructing justice with respect to the very allegations against which he was defending Pisciotti.

B. The Governing Law

In *United States v. Cancilla*, *supra*, the Court reversed Peter Cancilla's mail fraud conviction in light of the revelation that the government

> had learned ... that Peter Cancilla's trial counsel may have himself conspired with someone connected to the Cancilla schemes on similar fraudulent insurance claims involving cars owned by counsel.

725 F.2d at 868.

Following its prior decision in *Solina v. United States*, *supra*, where the Court found a *per se* Sixth Amendment violation because the defendant had been represented by an unlicensed lawyer, the Court stated:

> [W]ith the similarity of counsel's criminal activities to Cancilla's schemes and the link between them, it must have occurred to counsel that a vigorous defense might uncover

> evidence or prompt testimony revealing his own crimes, even more so than in *Solina*. It is noteworthy that Cancilla, on advice of his counsel, chose not to present a defense. Moreover, representation of Cancilla in ways other than by a vigorous defense may have been affected. It is difficult to see how counsel conflicted in this way could impartially have given Cancilla advice on whether or not to take a guilty plea, since counsel might have feared that acceptance of a plea would turn on Cancilla's cooperation, which might lead to discovery of the link to counsel's own activities. In such circumstances, proof of this type of conflict ... constitutes under *Solina* a per se violation of the Sixth Amendment right to effective assistance of counsel.
>
> ...What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities? The government appears to recognize this in describing the rationale of *Solina* as "the danger that the person acting as a lawyer might fear that a vigorous defense might cause the court or the government to inquire into his background and learn of his criminal activity." As indicated above, there were similar, probably greater, dangers here because the very evidence at trial or in plea negotiations might well lead to discovery of the attorney's prior criminal activity.

725 F.2d at 870. *Accord, United States v. Fulton, supra* (reversing and remanding for new trial where government

witness previously had imported heroin for defendant's trial counsel).

In essence, *Cancilla*'s progeny make clear that there is no bright-line rule to determine when the *per se* rule should apply. *United States v. Aiello, supra*, 900 F.2d at 532. But in assessing the facts of each case, certain considerations are deemed paramount.

First, the attorney's possible criminal exposure must be related to the crimes of which the defendant is accused. *See United States v. Eisen, supra*, 974 F.2d at 274; *United States v. Jones, supra*, 900 F.2d at 519.

Second, the basis for the attorney's potential criminal liability must not be fanciful. *United States v. Jones, supra*, 900 F.2d at 519.

Third, where the prosecutor investigating the attorney is also the attorney's adversary in the case on trial, it is far more likely that the attorney's conduct is tied to an effort to "please or impress" the prosecutor. *See, e.g., United States v. Eisen, supra*, 974 F.2d at 264; *United States v. Aiello, supra*, 900 F.2d at 531-32.

Here, as in *Fulton, supra*, all of these factors were present. Yet, the Second Circuit automatically reversed the one, but dismissed the other without comment. This dichotomy should trouble the Court because, as we demonstrate immediately below, there can be no colorable distinction between this case and the governing authorities.

C. Application of the Law to the Facts

Cancilla is virtually indistinguishable from this case. *First*, as in *Cancilla*, there is a direct correlation between the charges against Pisciotti and the allegations against Yamin. As such, "it must have occurred to counsel that a vigorous defense might uncover evidence or prompt testimony revealing his own crimes...." *Cancilla, supra*, 725 F.2d at 870.

Second, there was much more than "credible evidence," *United States v. Jones, supra*, that Yamin was involved in the purported justice obstruction. Indeed, the District Court stated that it "would have no difficulty making" a finding that Pisciotti's obstruction of justice dated back to Mrs. Perugini's Grand Jury testimony. (A: 2291) This statement, coupled with the prosecutor's claim that she believed Mrs. Perugini had testified falsely in the Grand Jury due "primarily [to] the actions of" Yamin, makes clear that Yamin was subject to a real and appreciable danger of prosecution.

Third, in contrast to cases such as *Aiello*, where the attorney allegedly feared prosecution in another district, Yamin stood to be prosecuted in the very same courtroom, by the very same prosecutor. *Contrast United States v. Eisen, supra*, 974 F.2d at 264 (No basis to conclude that defense attorney had motive "to please or impress [his potential] prosecutors *who did not participate in the Eisen case")* (Emphasis supplied).

Fourth, although *Cancilla*'s *per se* rule does not require Pisciotti to critique Yamin's performance, this performance supports the inference that he was seeking to protect himself at Pisciotti's expense. Of particular note is Yamin's shockingly incompetent effort to introduce Mrs. Perugini's grand jury testimony into evidence since it contained "many inconsistencies" *that were helpful to the prosecution*. (A: 166-67) Was Yamin seeking to help the prosecutor by offering into evidence prior consistent statements which the prosecutor could never have credibly offered? That this possibility exists is yet another reason why *Cancilla*'s *per se* rule should have been applied here.

In these circumstances, Yamin's representation was presumptively (and demonstrably) deficient, and Pisciotti's trial was presumptively unfair. Accordingly, this Court should grant certiorari and reverse his conviction.

IV

There Must be a New Trial Because a Government Expert was Allowed Improperly to Bolster the Credibility of its Linchpin Fact Witnesses by Testifying in Statutory Language Indicating Guilt

As explained in our Statement of Facts, the § 666 charges rested upon the suspect credibility of accomplice witnesses Richard Barbieri and John Corpaci. It is in this context that the District Court improperly permitted F.B.I. Special Agent Michael Clark[7] to express legal conclusions about the crimes allegedly committed by petitioners.

Specifically, Clark was permitted to give, *inter alia*, the following testimony, over defense objection:

> Q Now, you also referred, Mr. Clark, to the term corrupt payment. Do you recall that?
> A Yes.
> Q Is that a shorthand for something?
> A It is a shorthand for anything of value.
> Q And where was the term derived from, that is, where did it come from?

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[7] We acknowledge that the government did not call Clark as an expert. Nonetheless, he testified that he was an "expert on fraud" (A: 504), and the jury surely viewed him as such. Consequently, petitioners' rights here surely cannot hinge upon the magic words "qualified as an expert." Were it otherwise, the government could routinely call investigative agents without qualifying them as experts, and then ask them to opine on legal conclusions. As we will show, this result would rob the governing law of its force.

A *It comes from the statute which is Title 18, U.S. Code 666.*

(A: 666) (Emphasis supplied)

Hence, Clark was permitted to convey to the jury his conclusion that petitioners had been engaged in numerous illegal transactions, and had committed numerous violations of 18 U.S.C. § 666, the very crime with which they were charged. Under the Second Circuit's own precedents, the Trial Court's decision to permit this testimony was clear, reversible error. Here again, however, the Court of Appeals did not even address this claim.

"As a general rule an expert's testimony on issues of law is inadmissible." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 63 (1991). Hence, in *United States v. Scop*, 846 F.2d 135 (2d Cir.), *modified on other grounds*, 856 F.2d 5 (1988) (*"Scop II"*), the Court reversed mail fraud and securities fraud convictions because the trial court had permitted an expert witness to testify to his opinion that

> "... the stock of European Auto Classics was manipulated and that certain individuals were active participants and material participants in the manipulation of that stock. And that these individuals engaged in a manipulative and fraudulent scheme in furtherance of that manipulation."

846 F.2d at 138.

The Court reasoned that:

> Whitten made no attempt to couch the opinion testimony at issue in even conclusory factual

> statements but drew on the language of the statute and accompanying regulations concerning "manipulation" and "fraud." ... In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to "invade the province of the court to determine the applicable law and to instruct the jury as to that law," ... they could not have been helpful to the jury in carrying out its legitimate functions. "The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case."

846 F.2d at 140 (Citations omitted). *Accord, Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (error to permit expert to express his opinion, *inter alia*, that defendant's conduct was not "'justified under the circumstances' and 'totally improper'.")

Beyond *Scop* and *Hygh*, *United States v. Cruz*, 981 F.2d 659 (2d Cir. 1992), reversed a narcotics conviction where an investigator's testimony parallelled that of a government informer about the particular transactions at issue in the case:

> [Al]though such expert testimony logically adds nothing to the believability of a witness's account (again absent a suggestion of implausibility), it strongly suggests to the jury that a law enforcement specialist ... believes the government's witness[ ] to be credible and the defendant to be guilty, suggestions we have previously condemned. *See United States v. Scop*, [*supra*,] 846 F.2d [at] 139-43....

981 F.2d at 663 (Footnote omitted). *Contrast United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) (expert did not use statutory language or give statutory explanations).

Here, Agent Clark's testimony had the precise effect "condemned" by *Cruz*. Before he testified, there had been no mention of terms such as "corrupt payments" because the Trial Court had not permitted opening statements. Hence, the subsequent testimony of Barbieri and Corpaci was framed solely by the agent's characterization of the subject transactions as illegal, and his implicit conclusion that Barbieri and Corpaci were credible. This was unfair, reversible error, ignored by the Court of Appeals. Ironically, a different panel of the same Court had relied upon this very claim in granting petitioners bail pending appeal.

Moreover, Agent Clark's testimony was so prejudicial as to require a new trial on all counts of conviction. For, beyond his legal conclusions about the § 666 charges, Clark's testimony about money laundering also contained the conclusion that this crime involves "monies obtained through some type of illegal activity." (A: 666) Further, all of the charges in this case truned on the fundamental allegation that Santopietro was a "corrupt" mayor. Hence, when Agent Clark was permitted to testify, in essence, that the alleged payments to Santopietro were "corrupt" as a matter of law, he lent great credence to the government's entire case. Finally, since fraudulent intent was an element of all crimes charged in the indictment, Agent Clark's testimony served to supply proof of that element as to all counts. *See Scop II, supra*, 856 F.2d at 7 (reversing perjury counts in addition to fraud counts because "the improper ... testimony related to the perjury as well as conspiracy and mail and securities fraud charges").

In sum, this issue plainly should have been discussed by the Second Circuit, and should be reviewed by this Court.

V

Pursuant to Rule 12.2 of This Court, Petitioners Join in the Arguments Contained in the Petitions Submitted by Their Codefendants Insofar as They Are Applicable to Petitioners

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JUDD BURSTEIN, P.C.
Attorneys for Petitioners
950 Third Avenue
New York, New York 10022
(212) 826-1200

On the Petition
Judd Burstein, Esq.
Marc Fernich, Esq.